IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

PC CRIMINAL APPEAL NO. 1 OF 2022

(Arising from Criminal Appeal No. 13 of 2021 of Moshi District Court, Originating from Criminal Case No. 72 of 2020 of Mabogini Primary Court)

SHABANI MESHAKI.....1st APPELLANT

ELIKANA PATRICK MLAY.....2nd APPELLANT

GUDIEL JOSEPH MLAY.....3rd APPELLANT

VERSUS

BERNAD BENEDICT..... RESPONDENT

JUDGMENT

14/03/2022 & 05/05/2022

SIMFUKWE, J.

This is a second appeal preferred by the appellants after being convicted with the offence of malicious damage to property contrary to **section 326** (1) **of the Penal Code, Cap 16, R.E 2019;** before Mabogini Primary Court. They were charged together with two others who were found not guilty.They were sentenced to pay a fine of Tshs 200,000/= each or serve six months imprisonment. The appellants were also ordered to pay compensation to the respondent at the tune of Tshs. 1,680,000/=. After being dissatisfied with the decision of the Primary court, the appellants appealed before Moshi District court on four grounds;

1. *That, the trial court erred in law and facts by reaching on the judgement while the case was not proven beyond reasonable doubt.*
2. *That, the trial court erred in law and facts reaching on the decision basing on speculations evidence and the weak evidence of the prosecution side.*
3. *That the trial court erred in law and facts for failing to analyses (sic) the weak evidence tendered by prosecution in relations (sic) to the basic elements of the offence of malicious injuries (sic) to property as requirement of the law. (sic)*
4. *That the trial court erred in law and facts by failure to visit locus in quo and that led to doubt decision. (sic)*

The first appellate court found that according to circumstancial evidence there was wilful and unlawful act which was done by the appellants by destructing the crops of the respondent. The basis of the findings of the first appellate court was that the appellants and the respondent had a land dispute over the same land in which the respondent won the case, and that the said farm was possessed by the appellants previously.

Still aggrieved, the appellants in exercise of their constitutional right filed the instant appeal on three grounds:

1. *That, the first Appellate court erred in law and in fact by upholding the decisions (sic) of the trial court, while the case at trial court was not proven beyond reasonable doubt.*
2. *That, the first appellate court erred in law and in fact upholding the decisions (sic) of the trial court, which was basing on speculations evidence and the weak evidence of prosecution side.*

3. *That, the first appellate magistrate (sic) erred in law and facts for uphold (sic) the decision of the trial court, while the basic elements of the offence of malicious injuries to property was (sic)not proved as required by the law, which led to the miscarriage of justice.*

Both parties were unrepresented, thus the appeal was ordered to be argued by way of written submissions in response to the prayer of the first appellant.

In support of their appeal the appellants submitted among other things that there was no proof beyond reasobable doubts that the appellants committed the offence of malicious damage to property. That, no one saw them committing the offence. That, the first appellant raised a defence of alibi at the trial that he was at Kifaru in Mwanga District taking care of his wife who was sick since 17/08/2020 to 20/08/2020.

The second appellant also raised a defence of alibi that on the fateful date he was in Dar es Salaam attending a wedding of his young brother and produced a bus ticket to prove that fact. The third appellant raised the same defence of alibi that on the fateful date he was at Dar es Salaam attending a wedding of his son since 16/08/2020 to 21/08/2020. A bus ticket was tendered at the trial to substantiate that argument.

The appellants submitted further that, the respondent's testimony based on assumption, suspicion and hearsay. That, the said suspicion was based on the fact that in 2017 the appellants had a land dispute with the respondent before the Land Tribunal which was decided in favour of the respondent. It was averred that having a land dispute previously is not proof that the appellants committed that offence

without proof beyond reasonable doubt. It was insisted that suspicion however grave is not a basis for a conviction in a criminal trial. To cement their argument, the appellants cited the case of **Christian Mbunda vs Republic [1985] TLR 340** where **Hon. Msumi J** held that:

> *".... in order to convict an accused of theft the prosecution must prove the existence of actus reus which is specifically termed as asportation and mens rea or animus furandi...."*

The appellants also cited **section 110 (1) of the Evidence Act Cap 6 R.E 2019** which states that whoever desires any court to give judgment as to any legal right or liability depend on the existence of facts which he asserts must prove that those facts exist.

It was contended further that to ground conviction on circumstantial evidence it must be incapable of more than one interpretation. That, circumstantial evidence must be capable of proving a proposition with the accuracy of mathematics. The appellants were of the view that in this case circumstantial evidence does not prove the offence charged. That, such evidence should be such that irresistibly points to the guilt of the accused (appellants) to the exclusion of everyone else. Thus, the evidence did not pass the test, since the offence of malicious damage to property could have been committted by somebody else. To buttress their point, the appellants referred to the case of **Simon Musoke v. Republic [1958] 1 715** in which it was held that:

> *"In a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the*

accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt."

Reference was also made to the case of **Ndalahwa Shilanda and Buswelu Busaru vs. Republic, Criminal Appeal No. 247 of 2008,** in which the Court of Appeal of Tanzania stated that:

"(i) The circumstantial from which an inference of guilt is sought to be drawn must be cogently and firm established.

(ii) Those circumstance must be defined tendency unerringly pointing towards the guilt of the accused.

(iii) The circumstances taken cumulatively should form a chain so, complete that there is no escape from conclusion that within all human, the crime was committed by the accused and not one else."

On the basis of the above authority, the appellants contended that evidence tendered by the respondent before the trial court are inadequate to support the conviction on the offence of malicious damage to property contrary to **section 326 (1) of the Penal Code, Cap 16 R.E 2019.** They said that all witnesses of the respondent proved and confirmed that they did not see the appellants committing the offence. They quoted what was said by the respondent at page 9 of the proceedings of the trial court:

"Na uki niuliza kama nimewaona sitakuwa na majibu maana hiyo sumu imepigwa usiku wa manane na mimi nakaa Uru."

At page 14 of the proceedings of the trial court SM2 stated that:

"Siwezi jibu ndio wanahusika au hapana, nilifanyia kazi malalamiko toka kwa Mlalamikaji, na baada ya kumhoji mlalamikaji na kwa kina nilihisi ni hawa ambao ndio walikuwa na mgogoro."

In conclusion of the first ground of appeal, the appellants submitted that in criminal cases the prosecution must prove their case beyond reasonable doubts. That, in this case the trial magistrate erred in law for failure to uphold that the prosecution failed to establish their case beyond reasonable doubts.

On the second ground of appeal that basic elements of the offence of malicious damage to property were not proved as required by the law; it was submitted that no *actus reus* or *mens rea* was proven as ingredients of the offence were not proven. The appellants quoted **section 326 (1) of the Penal Code** (supra) which provides that:

"Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence and except as otherwise provided in this section."

In their opinion, evidence of SM1 was hearsay and based on suspicion that the appellants committed the offence. To cement their argument, the appellants subscribed to the case of **Jonas Nkinze vs Republic [1992] TLR at page 214** at paragraph 3 where it was held that:

"Whenever a person is charged with an offence, it is the duty of the trial court to analyze and ascertain each element of the alleged particular offence so as to satisfy itself that such person has committed such offence beyond reasonable doubt. It is also the duty of the prosecution to prove their case beyond reasonable doubt as

provided under ***S. 110 (1) of the Evidence Act Cap 6 R.E 2019."***

The appellants went on to submit that in the case of **Isidori Patrice vs. Republic, Criminal Appeal No. 224 of 2007** (unreported) the Court of Appeal of Tanzania at page 14 held that:

"It is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the actus reus of the offence with the necessary mens rea. Accordingly, the particulars, to give the accused a fair trial in enabling him to prepare his defense, must allege the essential facts of the offence and any intent especially required by the law."

The appellants finalised their submission by stating that since the prosecution failed to prove their case beyond reasonable doubts, the decision of the trial court should be quashed, sentence be set aside and appellants be set free.

In his reply the respondent stated among other things that this being a second appellate court, the court cannot interfere with concurrent findings of the two lower courts unless there is misapprehension of evidence for which he said that there is no such issue. He substantiated his point by citing the case of **Deemay Daat and 2 others v. Republic [2005] TLR 132** in which it was stated that:

"It's common knowledge that the 2nd appellate Court cannot interfere the concurrent finding of the lower court unless where

there is misdirection and non-direction on the evidence of the lower court has misapprehended the substance..."

Responding to the 1st ground of appeal that the trial Court erred in law and facts by reaching the judgment while the case was not proven beyond reasonable doubt; the respondent submitted that the respondent proved his case beyond reasonable doubt as required under the law. That, the appellants in their submission have failed to stipulate the doubts which have been not proved as required under the law. Rebutting the averment that the trial court erred by relying on the previous land dispute, the respondent referred to the case of **Crospery Ntangalinda @ Coro v. Republic, Criminal Appeal No. 312 of 2015,** in which the Court of Appeal of Tanzania at Bukoba held that:

"It has been said that circumstantial evidence is very often the best evidence. It is the evidence of surrounding circumstances, which undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics."

The respondent submitted further that, although he had no direct evidence, but based on the circumstantial evidence, he clearly proved the charge. Hence, the trial court was right when it convicted the appellants on circumstantial evidence.

Concerning the defence of alibi raised by the appellants, the respondent was of the opinion that the same fall short for failure to prove it, hence, rightly neglected by the trial court.

Regarding the authorities cited by the appellants, the respondent submitted that the same were distinguishable as the conviction was based on circumstanctial evidence and that it was not necessary to

prove the case by way of direct evidence as averred by the appellants, which was purely misconception.

On the 2nd ground of appeal that ingredients of the offence of malicious damage to property were not proved; the respondent responded that the averment is purely misconceived and unfounded. He quoted **section 326 (1) of the Penal Code** (supra) which establishes the elements of the offence of malicious damage to property, and insisted that the trial Magistrate clearly held that the offence charged was proved and all elements of the offence were proved by the respondent. Reference was made to page 6 and 7 of the trial court judgment.

The respondent prayed that this appeal should be dismissed for being devoid of merits, and the decision of the two courts below be upheld.

On the outset from the record and the submissions of both parties, there is no dispute that the appellants were convicted on circumstantial evidence. Also, it is not disputed that the appellants had a land dispute with the respondent which was resolved in favour of the respondent herein. Moreover, the fact that the rice paddy nursuries of the respondent were destroyed, was not disputed by the appellants at the trial and the respondent adduced evidence to prove the same beyond reasonable doubts.

In order to ground conviction on circumstantial evidence, as a matter of law, the same must not be capable of more than one interpretation. Thus, the issue for consideration in this case is ***whether circumstantial evidence adduced by the respondent before the trial court passed the test of not being capable of more than***

one interpretation. With respect, I subscribe to the cases of **Simon Musoke v. Republic** and **Ndalahwa Shilanda and another v. Republic** (supra) cited by the appellants.

In his judgment at page 8, the learned trial Magistrate gave a thorough reasoning of the defences of alibi which were raised by all accused persons. He discredicted the defences of the three accused persons, the appellants herein and gave reasons to the effect that the appellants did not call any witness to prove their defence of alibi. Second, their bus tickets issued at Moshi were found to have been written by the same person who wrote the tickets issued at Dar es Salaam. Thus, the said tickets were found to have been fabricated. On the other hand, the accused persons Thadei Richard @Mlay and Elifuraha Jonas, their defence of alibi was found to be credible and they were acquitted on that basis.

The trial court judgment at page 8 also reveals that the learned trial Magistrate discussed how and why the appellants are incriminated in this matter. I wish to quote part of the trial court judgment the last paragraph at page 8, it reads:

> *"Kwa mchanganuo huo wa utetezi wao mahakama inajenga hoja kuwa washtakiwa namba 2, 3 na 5 walihusika moja kwa moja* ***hasa ikizingatiwa wanakiri kuwa na kesi ya mgogoro wa shamba ambapo walitolewa katika mashamba hayo ya mlalamikaji aiiyokuwa kaotesha miche na pia kuna ushahidi wa wazi kuwa waliitwa hata na wazee wakatakiwa kula amini lakini wao waiikataa washitakiwa namba 1 na 4 wao walikula hiyo yatosha kutamka moja kwa moja waiihusika kutenda***

jambo hilo baya *wakilenga kumkwamisha SM1 kwa kwenda kuplga sumu vitalu vyake majira wanayoua (sic) kuwa mzee huyo haishi karibu hato watambua jambo ambalo ni ukatili usio elezeka."*
Emphasis added

From the above findings of the trial court, this court is satisfied that the circumstantial evidence which was relied upon to ground conviction against the appellants was incapable of more than one interpretation.

The trial court also found that apart from the rice paddy of the respondent, there was no other farm which was found to have been fumigated with poison.

Thus, the appellants are incriminated on the basis of their conducts after the land dispute had been resolved in favour of the respondent. Whereas after the land dispute had been resolved, the disputed farm was found to have been hired to third parties who were ordered to stop cultivating the disputed farm after harvesting their crops. Thereafter, the respondent reported to the village leadership where the appellants were called. It is after the appellants had refused to swear before the elders that they wo'nt trespass anymore into the farm of the respondent, that the rice paddy of the respondent was found to have been fumigated with poison. This being the second appellate court, I do not see any basis to interfere the concurrent findings of facts of the two courts below as no principle has been violated, no evidence has been misapprehended and the trial court did not err in its approach of evaluating evidence which was adduced by both parties.

Regarding the issue that elements of the offence were not proved, since the fact that the rice paddy of the respondent was fumigated with poison (which destroyed the said rice paddy) was not disputed at the trial, I find the 3rd ground of appeal to be an after thought. Otherwise, circumstantial evidence on the trial court record, proves the offence charged beyond reasonable doubt.

In the event, I hereby uphold the concurrent decisions of the two courts below and find this appeal to have no merit. Appeal dismissed accordingly.

Dated and delivered at Moshi this 05th day of May, 2022.

S.H. Simfukwe

Judge

05/05/2022